



## Natural Resource Damages

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Last updated on Tuesday, September 18th, 2007.

# Natural Resource Damages: A Primer



## Introduction

The purpose of this primer is to define Natural Resource Damage (NRD) concepts and terms, and discuss the following topics as they relate to NRD: the authority under which NRD are assessed; the definition of natural resources; the role of EPA; the designation of Natural Resource Trustees; and the conduct of natural resource damage assessments (NRDAs) and restorations. Although impacts to natural resources may be addressed under other statutory authorities, this site focuses on provisions under CERCLA or OPA.

Natural resource injuries may occur at sites as a result of releases of hazardous substances or oil. Trustees use NRDAs to assess injury to natural resources held in the public trust. This is an initial step toward restoring injured resources and services and toward compensating the public for their loss.

## CERCLA and OPA Statutory Authority

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) provides a comprehensive group of authorities focused on one main goal: to address any release, or threatened release, of hazardous substances, pollutants, or contaminants that could endanger human health and/or the environment. CERCLA's response provisions focus on the protection of human health and the environment. The statute also provides authority for assessment and restoration of natural resources that have been injured by a hazardous substance release or response.

The Oil Pollution Act (OPA) was enacted in reaction to the *Exxon Valdez* oil spill and provides authority for oil pollution liability and compensation as well as for the Federal government to direct and manage oil spill cleanups. Similar to CERCLA, OPA contains authorities to allow the assessment and restoration of natural resources that have been contaminated by the discharge, or threatened discharge, of oil.

## Natural Resources Defined

Both CERCLA and OPA define "natural resources" broadly to include "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources..." Both statutes limit "natural resources" to those resources held in trust for the public, termed Trust Resources. While there are slight variations in their definitions, both CERCLA and OPA state that a "natural resource" is a resource "belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by" the United States, any State, an Indian Tribe, a local government, or a foreign government [CERCLA §101(16); OPA §1001(20)].

NRD are for injury to, destruction of, or loss of natural resources, including the reasonable costs of a damage assessment [CERCLA §§101(6); 107(a)(4)(C); OPA §§1001(5); 1002(b)(2)]. The

measure of damages is the cost of restoring injured resources to their baseline condition, compensation for the interim loss of injured resources pending recovery, and the reasonable cost of a damage assessment [ [43 CFR Part 11](#) ; [15 CFR Part 990](#) ].

## EPA's Role: Notification and Coordination

EPA is not a Natural Resource Trustee, nor is it authorized to act on behalf of Natural Resource Trustees. Rather, under CERCLA and OPA, EPA shares with the U.S. Coast Guard the general responsibility for investigating and responding to contamination by hazardous substances or oil. The Coast Guard is primarily responsible for contamination involving the coastal zone including all U.S. waters subject to the tide, the Great Lakes, and deepwater ports. EPA is primarily responsible for contamination on land and inland waters. This web site is focused on EPA's role in the CERCLA and OPA processes.

CERCLA provides EPA with comprehensive authority to respond to hazardous substance releases by initiating either response activities financed by the Hazardous Substance Superfund (Superfund) or enforcement actions to force responsible parties to pay for cleanups. However, for NRD, the Agency's role is more limited: primarily involving the notification of and coordination with Trustees. As part of its response responsibilities, EPA is required to:

- Promptly notify Trustees of potential injuries to natural resources from releases under investigation [CERCLA [§104\(b\)\(2\)](#) ] ; and
- Coordinate assessments, investigations, and planning with Trustees [CERCLA [§104\(b\)\(2\)](#) ].

When an enforcement action is initiated, CERCLA requires EPA to:

- Notify Federal Natural Resource Trustees of settlement negotiations with potentially responsible parties, if the release of hazardous substances may have resulted in injuries to natural resources under their Trusteeship [CERCLA [§122\(j\)\(1\)](#)]; and
- Encourage the participation of Federal Natural Resource Trustees in settlement negotiations [CERCLA [§122\(j\)\(1\)](#) ].

Early involvement of Trustees in CERCLA response and enforcement actions increases the likelihood that selected response actions and settlement agreements will include measures to protect and/or restore natural resources.

Under OPA, EPA is the lead agency in responding to oil spills in inland waters. EPA is required to initiate a removal action when there is a discharge, or substantial threat of discharge, of oil into inland waters "that may affect natural resources belonging to, appertaining to, or under exclusive management authority of the United States" [Federal Water Pollution Control Act [§311\(c\)](#), 33 U.S.C. [§1321\(c\)](#), as amended by OPA [§4201\(a\)](#)]. OPA requires EPA to "consult with affected [T]rustees" on removal actions taken in conjunction with any discharge of oil [OPA [§1011](#) ].

For more information on EPA's notification and coordination activities, please refer to the "NRD Slide Show" on the sidebar of this page.

## Natural Resource Trustees

Under both CERCLA and OPA, responsibility for protection of natural resources falls with Federal, State, and Tribal Trustees. This is because no one individual "owns" a natural resource; rather, they are held in trust for the public.

Both CERCLA and OPA provide authority for designated Trustees to act as Natural Resource

Trustees on behalf of the public. In both CERCLA and OPA, certain Federal, State, and Indian Tribe officials can be designated as Trustees. However, under OPA foreign governments can also choose officials to act as Trustees.

Trustees have been given responsibility for restoring injured natural resources. The two major areas of Trustee responsibility under CERCLA and OPA are:

- Assessment of injury to natural resources; and
- Restoration of natural resources injured or services lost due to a release or discharge.

To meet these responsibilities, both statutes provide several mechanisms. The Trustees can either:

- Sue in court to obtain compensation from the potentially responsible parties (PRPs) for NRD and the costs of assessment and restoration planning; or
- Conduct assessments or restorations in accordance with certain standards specified by the Federal government and file a claim for reimbursement from the Trust Fund established under OPA; or
- Participate in negotiations with PRPs to obtain PRP-financed or PRP-conducted assessments and restorations of NRD.

Details about these statutory tools can be found in [NRD Related Statutory Information](#).

## **NRD Assessments**

One of the primary responsibilities of Trustees under both CERCLA and OPA is to assess the extent of injury to a natural resource and determine appropriate ways of restoring and compensating for that injury. A natural resource damage assessment (NRDA) is the process of collecting, compiling, and analyzing information to make these determinations. Trustees have the option of using the methodologies prescribed by the Department of the Interior (DOI), 43 CFR Part 11, or the Department of Commerce's National Oceanic and Atmospheric Administration (NOAA), 15 CFR Part 990. The DOI regulations are to assess NRD under CERCLA, while the NOAA methodologies are applicable for NRDA's under OPA. NRDA's are underway in a variety of locations; many of which involve one or more Superfund sites.

The overall intent of the assessment regulations is to determine appropriate restoration and compensation for injuries to natural resources. If a Federal or State Trustee goes into Federal court and sues a potentially responsible party (PRP) for NRD under CERCLA, an assessment done in accordance with the DOI regulations is given the force and effect of a "rebuttable presumption" [CERCLA §107(f)(2)(C)]. If a Federal, State, or Tribal Trustee sues a PRP for NRD under OPA, an assessment done in accordance with the NOAA regulations is given a rebuttable presumption [OPA §1006(e)(2)]. This means that the burden of persuasion in court shifts to the PRP. It will be the task of the PRP to disprove the Trustee's assessment.

## **NRD Restorations**

Under CERCLA, monies recovered from an NRD claim are to be used only for restoration or replacement of the injured natural resource, or for acquisition of an equivalent resource (hereinafter called "restoration" unless otherwise noted) [CERCLA §107(f)(1)]. Under OPA, recovered sums are to be used only to reimburse or pay costs incurred by the Trustee with respect to the natural resources [OPA §1006(f)]; these include costs incurred while conducting NRDA's and developing and implementing plans for "the restoration, rehabilitation, replacement, or acquisition of the equivalent, of the natural resources" [OPA §1006(c)]. Any amount in excess of these costs must be deposited in the Oil Spill Liability Fund [OPA §1006(f)].

Restoration actions are principally designed to return injured resources to baseline conditions, but may also compensate the public for the interim loss of injured resources from the onset of injury until baseline conditions are re-established. Restoration activities have been successfully completed at several sites.

Natural Resource Trustees are required to develop and implement plans for the restoration of natural resources. The Trustee's plans form the basis of calculating NRD for court actions or claims against the OPA Trust Fund [OPA §§1006(c), (d)(1)-(2), 1012(a)(2) ].